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The power of ideas: the Commissioner and the influence of defunct economists

New developments in European competition policy. An old insight by John Maynard Keynes (1883–1946). As part of a series of articles to celebrate Oxera's 25th anniversary, Dr Gunnar Niels, Oxera Director, puts forward the optimistic view that, eventually, sound economic ideas will prevail, even in the reform of Article 82 of the EC Treaty

'I like aggressive competition—including by dominant companies—and I don't care if it may hurt competitors—as long as it ultimately benefits consumers.'

'Dominant companies should be allowed to compete effectively.'

The first of these quotes could have been taken from the average antitrust treatise or commentary in the USA in the 1970s, when the Chicago School was in full swing. The second quote echoes a much older US antitrust judgment, by Judge Learned Hand in 1945, that 'a successful competitor, having been urged to compete, must not be turned upon when he wins'.[1]

Instead, these quotes are from statements made by Neelie Kroes, the EU Competition Commissioner, at the end of 2005, when her Directorate-General introduced the review of the policy on abuse of dominance under Article 82 of the EC Treaty.[2]

Article 82 is one of the cornerstones of competition law, both at the EU level and in each Member State. It prohibits the abuse of a dominant position. The case law under Article 82 has come under heavy criticism for being 'form-based'—ie, it outlaws commercial practices such as price discrimination, loyalty rebates and bundling almost per se when undertaken by a dominant firm, regardless of whether they actually have a harmful effect on competition or consumers. In December 2005, the Commission published a discussion paper on Article 82 reform.[3] The main thrust of this paper was to try to move Article 82 policy towards a more 'effects-based' approach, where practices by dominant firms would be judged according to their economic effects on competition—for example, is a significant part of the market foreclosed, or does the conduct enhance economic efficiency?


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Since the publication of the discussion paper, there has been plenty of debate on the reform of Article 82, and also a number of European Court judgments (eg, *British Airways* and *France Telecom*) which, perhaps somewhat unhelpfully from a policy perspective, did not really endorse any movement towards an effects-based approach.[4] The Commission has not yet issued any follow-up document to the 2005 discussion paper, expected in the form of draft guidelines on the application of Article 82. For this next step it has reportedly decided to wait until the judgment by the Court of First Instance in the *Microsoft* case, which was announced in September.[5]

Much has already been said and written about the discussion paper—whether it goes too far, or not far enough, whether it creates greater or lesser legal certainty, etc. A good deal has also been made of the gap between competition policy in the EU and the USA—a contentious issue that some commentators sought to re-ignite following the *Microsoft* judgment. Is the gap narrowing or widening? Is Europe learning the lessons that US antitrust law learned in the 1970s?

Instead of addressing these issues, in this article I explore the reasons why the reform of Article 82 may have gathered the momentum that it has in the EU competition community—recent court rulings notwithstanding. I make reference to an insight by the British economist, John Maynard Keynes, set out in his magnum opus, *The General Theory of Employment,*

The views expressed in this article are those of the author.

Interest and Money (1936)—this is the insight into how powerful economic ideas can be, even if they take a long time to get noted.[6]

A powerful idea

Keynes' highly influential work developed a new theory of how economy-wide demand and supply might not naturally tend towards equilibrium, leading to unemployment (this was the time of the Great Depression), and looked at what governments could do about this. This represented quite a strong challenge to the prevailing orthodoxy in economics of 'classical' demand and supply theory. Keynes realised that his proposed policies (including greater government spending) might, superficially at least, be seen as more suitable for totalitarian states than for free-market economies.

It was perhaps with this likely opposition (both academic and political) to his ideas in mind that Keynes ended his *General Theory* with a hopeful note that, if his ideas were, as he believed, correct, in the longer term they would be influential, even if they were not immediately. Hence followed the passage quoted below.

'But apart from this contemporary mood, the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.'

Is it the 'encroachment of ideas' that lies behind the movement towards reform of Article 82?

An unstoppable force?

The following are some ideas on the direction of competition policy that were being voiced in the run-up to the Article 82 discussion paper.

– Competition is only an intermediate goal; the ultimate objective is consumer welfare and there may be trade-offs between competition and efficiency in attaining consumer welfare—for example, where there are scale efficiencies in production.

– Competition policy should protect the process of competition, not individual competitors; in this respect, efficiencies should be welcomed because they benefit consumers, even if they harm competitors.

– A misguided application of competition law may frustrate innovative and welfare-enhancing ways of doing business.

In US antitrust policy, these ideas had a significant impact in the 1970s and 1980s under the influence of the Chicago school. They are still well-embedded as principles in the current US case law.

The problem in Europe has been that this thinking sits rather at odds with the 'ordoliberal' tradition that has underpinned EU competition law from its very beginnings in the 1950s. In essence, this school of thought emphasises individual freedom as the primary objective for competition policy, and considers that the presence of dominant firms weakens the competitive process and reduces the economic freedom of other market participants. A dominant firm is in effect regarded as the proverbial bull in a china shop—it must be restrained to prevent it from inflicting further damage to its already fragile surroundings, and to keep a competitive structure in the market.[7]

Yet there seems to be strong support in the European competition community for a move towards an effects-based approach to Article 82. Many prominent commentators have pronounced their backing for such a move. There has been no statistical analysis of the responses to the Article 82 discussion paper, but the majority appear to be in favour. The Commission has received widespread praise for its effort to move Article 82 policy in this direction, even by those who think that it hasn't gone far enough. This is of course not to say that all those in favour are fully convinced by the underlying ideas—self-interest may be at work here too; for example, some large corporates may be attracted by a less intrusive approach to Article 82, while economists may savour the prospect of conducting more effects analyses. However, there is also support for an effects-based approach from many legal practitioners and policymakers.

This constitutes quite a sea change in opinion among the European competition community. Only five or six years ago there were still heated trans-Atlantic debates—for example, in the context of the controversial GE/Honeywell merger, with European Commission officials maintaining that the 'protect competition, not competitors' slogan is meaningless, because in order to have competition one needs competitors.[8] This position very much misses the point that competition policy is about promoting efficiency and consumer welfare, and that trying to keep competitors alive for the sake of

having a competitive market structure can be counter-productive in that regard. This previous Commission view is not upheld by the current Competition Commissioner, Neelie Kroes, as evidenced by her quotes at the start of this article.

On a personal level I have also observed this change. I jumped into European competition policy eight years ago from the other side of the Atlantic, after working at the Mexican Competition Commission, which in the 1990s had extensive interactions with the American and Canadian competition agencies. While working on an EC merger case seven years ago, I questioned why the European Commission placed so much weight on the views of competitors when assessing a merger—if anything, if a competitor objects, shouldn't that be a reason to view the merger positively? The lawyer I was working with replied that this was a 'very American' viewpoint. I think it is fairly mainstream in Europe now, too.

I can only explain these developments in terms of Keynes' insight. The power of ideas is at work here! The idea that competition law should protect competition, not competitors, has been embraced by most of the European competition community, and, as noted above, expressly by the EU Commissioner herself. (I do not wish to take the Keynes quote too far here—I am not implying that the policymakers at the European Commission are, in Keynes' words, under the spell of 'some defunct economists' or 'academic scribbler of a few years back', and even less that they are 'madmen in authority, hearing voices in the air'!)

Reform now, or in the long run?

Of course the above may well be too optimistic. In the short term, it is far from clear what the outcome of the reform of Article 82 will be. Legal uncertainty is currently high, with the Commission having set out a new path towards an effects-based approach, but recent European Court decisions, including *Microsoft*, arguably reflecting the old approach. The next European Commission publication on Article 82 reform is now eagerly awaited.

Clearly, one can see that the ideas that revolutionised US antitrust law decades ago are now beginning to have an impact in Europe. As Keynes foresaw, this happens only after a 'certain interval'. If the current round of reform doesn't improve matters, some future round will, even though, as Keynes himself famously said, 'In the long run, we are all dead'.

Gunnar Niels

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[1] *US v Aluminium Co of America*, 148 F.2d 416, 430 (2nd Cir, 1945).
[2] Commissioner Neelie Kroes (2005), 'Preliminary Thoughts on Policy Review of Article 82', speech at the Fordham Corporate Law Institute, New York, September 23rd 2005.
[3] European Commission (2005), 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses', December.
[4] C-95/04 P, *British Airways v. Commission*, ECJ Judgment of March 15th 2007, and Case T-340/03 *France Télécom SA v Commission*, CFI Judgment of January 30th 2007.
[5] C-T201/04 *Microsoft v. Commission*, Judgment September 17th 2007. For a commentary on the *Microsoft* case, see 'Microsoft versus the Commission: With Great Power Comes Great Responsibility', by Dr Philip Marsden, also in this month's *Agenda*.
[6] Keynes, J.M. (1936), *The General Theory of Employment, Interest and Money: The Collected Writings of John Maynard Keynes*, London: The Macmillan Press.
[7] As formally established in *Michelin* (1983), a dominant firm has a 'special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'. Case 322/81, Michelin [1983] ECR 3461.
[8] See, for example, Drauz. G. (2001), 'Unbundling GE/Honeywell: The Assessment of Conglomerate Mergers under EC Competition Law', Fordham Corp. L. Inst. 183, 197–98 (B. Hawk, ed., 2002).